U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 19Nov2002

CASE NUMBER: 2001-LHC-2520

OWCP NO.: 07-125896

IN THE MATTER OF

MELVIN J. STOUT,
Claimant

v.

EQUITABLE/HALTER SHIPYARD,
Employer

and

HALTER MARINE, INC.,
Carrier

APPEARANCES:

Jeremiah A. Sprague, Esq.
On behalf of Claimant

Collins C. Rossi, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING MODIFICATION AND AWARDING BENEFITS

This is a claim for modification under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Equitable/Halter Shipyard, (Employer), and Halter Marine, Inc. (Carrier), against Melvin Stout, (Claimant), on the basis that Claimant is capable of engaging in alternative employment following an ALJ's decision in 1997 that Claimant was temporarily totally disabled and that Employer failed to show alternative work. Modification under

Section 22 of the Act is intended to replace traditional notions of *res judicata*, and allow broad discretion to correct mistakes of fact based on new evidence, cumulative evidence, or by reflecting on evidence already submitted in a new light. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, 92 S. Ct. 405, 30 L.Ed.2d 424 (1979). An employer may attempt to establish suitable alternative employment on a modification proceeding. *Blake v. Ceres, Inc.*, 19 BRBS 219, 221 (1987).

In this case, two formal hearings were held on this matter before the Office of Administrative Law Judges on June 10, 2002, and again on August 27, 2002, in Metairie, Louisiana. At the first hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced five exhibits, which were admitted, including: medical records and deposition testimony from Dr. Joseph Rauchwerk, Claimant's mileage records, and correspondence from Tami Shilling.[1] Employer introduced nine exhibits, which were admitted, including: a May 2, 1997 Decision and Order awarding Claimant benefits against Employer; Employer's Request for Modification; correspondence with the Office of Workers' Compensation Programs; medical records from Drs. Robert Steiner and Kevin Bianchini; a vocational rehabilitation report from Tami Shilling; a May 25, 2001 functional capacity evaluation, a surveillance report and videotape; and Claimant's deposition.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The injury/accident occurred on February 13, 1992, and Employer was advised of the injury on the same day;

2. Claimant was injured in the course and scope of employment and an employer-employee relationship existed at the time of the accident;

3. An informal conference was held on April 10, 2001;

4. Claimant's average weekly wage at the time of his injury was $426.72; and

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[1] References to the transcript and exhibits are as follows: trial transcript from June 10, 2002 - Tr. I, p. __; trial transcript from August 27, 2002 - Tr. II, p. __; Claimant's Exhibits - CX-__, p.__; Employer's Exhibits- EX-__, p.__; Administrative Law Judge's Exhibits- ALJX-__, p.__ .

5. Claimant received temporary total compensation benefits from April 30, 1997, to April 1, 2002.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and Extent of Claimant's disability.

2. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Background:

As determined by Judge Mills in 1997, the relevant facts of this case are as follows:

Claimant is [62] years old and has a 9th grade education but has since obtained his GED. Claimant was enrolled at St. John's University but dropped out. (Tr. p. 12). Claimant graduated from a welding and blueprint reading school at Jefferson Junior College. Claimant also took a course in clinical hypnotherapy at St. John's University. (Tr. p. 13). In the past, Claimant has worked as a boilermaker, pipefitter, shipfitter, and as a sheetrock hanger. (Tr. p. 13). All of Claimant's jobs in the past have been manual labor.

Claimant first worked for Employer [25] years ago when he was involved in the building of barges. Claimant resumed employment with Employer around 1990 and was principally involved in repairing barges. (Tr. p. 14). Claimant was employed by Employer as a shipfitter. (Tr. p. 14). His duties included removing and repairing barges which involved cutting damaged areas out and replacing them. (Tr. p. 15). Claimant referred to his work as "heavy duty" and stated that he was required to lift 175 to 200 pounds. (Tr. p. 15).

Claimant was injured on February 13, 1992, when he was working on a barge line and was pulling ballast out of the bottom of a ship. Claimant, after his injury, continued to work that day until the job was completed. (Tr. p. 16). Claimant informed his foreman of his injury. (Tr. p. 17). Claimant returned the next day and attempted to work but was written up for lack of production. (Tr. p. 18). On the

> next day, Claimant attempted to work again but found that after he sat down, he was not able to get back up. (Tr. p. 18). Claimant first went to a doctor on his own which he paid for himself. (Tr. p. 18).

Stout v. Equitable/Halter Marine, Inc., 1996 LHC 923 (1997).

B. Claimant's Testimony

Claimant testified that he had not found any employment since suffering his workplace injury in 1992. (Tr. I, p. 8). Clamant attempted to find work, and tried to start a business in hypnosis after taking some classes, but Claimant never received any money. (Tr. I, p. 8). Claimant testified that he worked with Employer's rehabilitation specialist, Tami Shilling, in attempting to find different jobs. (Tr. I, p.11). Recently, Claimant had applied to a collection agency, but he related that he told the prospective employer that he was injured and receiving workers' compensation while filling out the application. (Tr. I, p. 12-13). Ms. Shilling had sent other job leads to Claimant, and he testified that he had applied for positions as a cashier, driver, car wash attendant, and applied for different positions in the fast food service, loan and flooring industries among others. (Tr. I, p. 14-16).

Regarding his activities since his accident, Claimant testified that he purchased some property in Crossroads, Mississippi, he hired a bulldozer to level the property, but he never performed any work on the property himself. (Tr. I, p. 9). Claimant did install light poles and he engaged in framing activities, with help, and he installed a water line, but denied doing any digging. (Tr. I, p. 9-11). Claimant also acknowledged that he was capable of carrying a fifty foot hose twenty-five feet. (Tr. I, p. 11). Claimant testified that he could lift as much as thirty to fifty pounds, but he did not know what affect such lifting would have on his back. (Tr. I, p. 19). For example, in April 2002, Claimant lifted his granddaughter off the floor, a weight in excess of thirty pounds, but that activity caused him pain. (Tr. I, p. 20). Claimant loaded and unloaded groceries, lifted in the ordinary course of his daily life, but he related that hurt while performing those activities. (Tr. I, p. 29). While Claimant could lift objects, he did not think he could do so on a regular basis. (Tr. I, p. 29). On a typical day, Claimant related that he stayed indoors, sat in his yard, or visited a friend. (Tr. I, p. 31). Claimant was capable of driving as evidenced by his trips to New Orleans to see his treating physician, Dr. Rauschwerk, and to attend the formal hearing. (Tr. I, p. 21). The eighty mile drive to New Orleans, however, took him 3.5 hours because Claimant stopped three different places along the route. (Tr. I, p. 42). To treat his pain, Claimant testified that he took prescription medication consisting of Vicodin and Soma.[2] (Tr. I, p. 27).

Claimant testified regarding his May 25, 2001 functional capacity evaluation which lasted from 9:00 a.m., to 2:00 p.m. (Tr. I, p. 39). Claimant related that he did not perform the entire test

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[2] Claimant also testified that he had lost his sense of taste and smell as a result of a May 1997, chemical spill in Bogalusa, Louisiana. (Tr. I, p. 31-32).

in one day because he was not physically able, so the evaluator allowed Claimant to do the tasks over a two day period. (Tr. I, p. 39). Claimant was hurting after the first day, so he went home and he declined to drive back to the location of the functional capacity exam on the second day. (Tr. I, p. 39-40).

After reviewing the investigator's videotape depicting Claimant undertake home maintenance and improvement activities, Claimant testified that the trench he dug to bury electrical cable measured fourteen feet in length and was only four to six inches deep, the two-inch PVC piping that he was carrying weighed six pounds, the ladder weighed twenty-one pounds, the cable weighed eight pounds, and the twenty-six feet of piping he carried in a roll weighed thirteen pounds. (Tr. II, p. 100-01). At the time the investigator took the video, Claimant was advertising tire planters for sale that his son had made. (Tr. II, p. 101). Claimant also had barbecue grills and cattle feeders for sale that his son-in law had constructed at his direction, but he had not sold any and currently he uses the cattle feeders to grow his tomato plants. (Tr. II, p. 101-02). To undertake the activities depicted in the video tape, Claimant testified that he took or four Vicodin before beginning work and after undertaking the activities, Claimant testified that he went to bed. (Tr. II, p.107-08). When asked in a deposition about ten weeks after the video tape was completed, Claimant denied that he had performed any work around the house, and Claimant explained this comment at the hearing by stating that he did not consider "piddling" as work. (Tr. II, p. 114, 118).

C. Esma McGuire Irvine

Ms. Irvine, the daughter of Claimant, testified that she was present when the private investigator filmed Claimant, and she stated that Claimant was digging a small trench for electrical wire. (Tr. II, p. 75). The trench extended about twenty feet and was only five inches deep. (Tr. II, p. 75-76). The tubing that Claimant carried was PVC piping, and only weighed about four pounds. (Tr. II, p. 76). Ms. Irvine carried the electrical wire herself, a weight of about twelve pounds. (Tr. 76-77).

Ms. Irvine testified that before undertaking the home maintenance activities, Claimant had informed her of his intentions, and that he was going to take some pain medication so he could perform the work. (Tr. II, p. 77). Ms. Irvine thought Claimant took four Vicodin and one Soma. (Tr. II, p. 78). After about forty-five minutes, Claimant related to her that the medication was taking affect, but after a short time of digging, Mr. Irvine related that Claimant was exceeding his limitations. (Tr. II, p. 77). Ms. Irvine admonished Claimant to stop because she knew that whenever Claimant undertook such activity he would have to spend the next several days in bed. (Tr. II, p. 77). In fact, Claimant spent two-and-a-half days in bed following his shoveling activity. (Tr. 78).

Regarding the barbecue grills, cow feeders and other stuff Claimant had for sale, Ms. Irvine testified that Claimant directed his son and her former husband on how to weld the items, and Claimant only attempted to sell them. (Tr. II, p. 79-80).

Regarding Claimant repair work on his porch that the private investigator filmed, Ms. Irvine

testified that she had observed Claimant's physical state after performing that work and it was not good. (Tr. II, p. 81). The work was a necessity because roofing shingles were loose, the forecast called for rain, and no other person was available to perform the work. (Tr. II, p. 81).

Claimant also built a blue playhouse for Ms. Irvine's daughter sometime around 1998. (Tr. II, p. 96). Claimant had his son do the framework, his son-in-law do the roofing and Claimant put up the paneling and trim on the inside, and shopped for curtains. (Tr. II, p. 96).

D. Testimony, Videotape, and Surveillance Report of John Adrian LaPointe

Mr. LaPointe, a private investigator with United Systems Investigations from Mobile, Alabama, was retained by Employer to observe Claimant in 1998, and had video footage of Claimant engaged in work-related activity around his home on March 24 & 31, 1998. (Tr. I, p. 51). At approximately 12:51 p.m., on March 24, 1998, Mr. LaPointe began video surveillance depicting Claimant installing electrical wire to a trailer. (EX 8, p. 1). After a short time, Mr. LaPointe moved locations to a wooded area near Claimant's property and began surveillance again at 1:50 p.m., filming Claimant digging a trench for his electrical cable, "continuously bending and stooping," and hooking up the electrical lines until 2:22 p.m. *Id*. During this activity, Mr. LaPointe only saw Claimant hold his back - as if in pain - once before resuming his shoveling. (Tr. II, p. 12).

On March 31, 1998, Mr. LaPointe returned to Claimant's property and began video surveillance around 10:11 a.m. when Claimant was carrying a ten to twelve foot ladder. (EX 8, p. 1). Claimant climbed the ladder several times and was hammering roofing felt on a building overhang. *Id*. Claimant left the viewing sight, but returned at 10:53 a.m., carrying posthole diggers, a shovel, and a chair. *Id*. Later Clamant bent over to retrieve an electrical cord. *Id*. At 12:10 p.m. Mr. Lapointe drove to Claimant's residence and began a conversation regarding the purchase of a barbecue grill Claimant had for sale. *Id*.

Claimant's barbecue grills ranged in price from $85.00 to $150.00, and he related that all the grills were build by him. (EX 8, p. 2). The grills were constructed from thirty-five and fifty-five gallon drums with angle iron for the table tops and legs. *Id*. Also present were cattle feeders, trailers iron, and wood floors priced between $600.00 and $750.00, as well as children's games that he rented out for birthday parties. *Id*. Claimant also related that he was a reverend, and a hypnotist who could cure back pain. (TR. II, p. 16; EX 8, p. 2).

On cross examination, Mr. LaPointe related that he had witnessed Claimant carrying about twenty to twenty-five feet of piping, but he did not know how much the pipe weighed. (Tr. II, p. 17). On one day of the videotape, Mr. LaPointe had a gap in time from about 11:15 a.m., to 12:52 p.m., during which time Mr. LaPointe lost observation of Claimant. (Tr. II, p. 18). A second gap ran from 12:55 p.m. to 1:52 p.m., and during the gap periods, Mr. LaPointe testified that Claimant engaged in constant activity, but the videotape did not reflect that because Claimant was outside of Mr. LaPointe's field of vision. (Tr. II, p. 19, 25). Mr. LaPointe had no actual knowledge of what Claimant was doing during the gap periods and Mr. LaPointe personally edited the videotape to

exclude those portion in which claimant was not depicted. (Tr. II, p. 21, 26). Out of the fourteen to fifteen hours Mr. LaPointe conduced surveillance of Claimant's residence, he only had forty-six minutes of videotape. (Tr. II, p. 35).

E. Testimony of Suzanne Lynch

Ms. Lynch, a seven year employee and current adjuster of Frank Gates Service Company, assists in the administration of workers' compensation cases for Employer. (Tr. I, p. 45). Ms. Lynch testified that after Claimant saw his physician, Dr. Rauchwerk, in March 2002, she was informed that the insurer was not funding the account and had no money to pay for doctors or anybody else. (Tr. I, p. 47). When Ms. Lynch informed Dr. Rauschwerk's office that she would continue to authorize treatment, but could not guarantee payment, Dr. Rauschwerk's office refused to see Claimant. (Tr. I, p. 47). Dr. Rauschwerk had requested an MRI of Claimant's back, Ms. Lynch approved that request, but the procedure was never performed due to a lack of funds. (Tr. I, p. 47).

F. Exhibits

(1) Medical Records of Dr. Joseph Rauchwerk

Following Claimant's formal hearing on November 7, 1996, and subsequent Judge Mills' April 30, 1997 Decision and Order, Dr. Flood stated on May 28, 1997, that Claimant's medical condition was basically unchanged for the past five years, that Claimant was afraid of surgery, and with or without surgery, Claimant's job potential was unlikely to change. (CX 1, p. 13). Dr. Flood stated that Claimant was only capable of "light type work." *Id*. On June 25, 1997, Claimant made a decision that he did not want to have any surgery in the foreseeable future, and Dr. Flood opined that Claimant had reached maximum medical improvement. *Id*. Claimant would be dependent on small doses of medication for the "unforeseeable future." *Id*.

On July 15, 1998, Dr. Flood interpreted x-rays of Claimant's lumbar spine as demonstrating increased disc space changes at L4-5 and mild disc space changes at L3-4. (CX 1, p. 11). Dr. Flood opined that Claimant was capable of working only within the limits of his functional capacity evaluation dated May 13, 1998. *Id*. After Claimant complained of increasing back pain, Dr. Flood ordered another MRI, and on November 20, 1998, he stated that the MRI demonstrated a herniated disc at L5-S1, a bulging disc at L4-5 and spondylolysis at L5-S1. *Id*. at 10. If Claimant condition deteriorated any further, Dr. Flood opined that Claimant would be an excellent candidate for a fusion. *Id*. Despite the deterioration of his condition, Claimant related to Dr. Flood on February 17, 1999, that he did not want to undergo surgical intervention. *Id*.

On x-rays taken on July 21, 1999, Dr. Flood recognized increasing osteophytosis at multiple levels and aortic calcification, changing Claimant work status for the first time from light work to totally and permanently disabled. (CX 1, p. 9). On October 13, 1999, Dr. Flood reiterated that Claimant was totally and permanently disabled, a fact that he realted to Riggle & Assocaites on February 18, 2000. (CX 1, p. 9; CX 2, p. 6). On April 5, 2000, Dr. Flood counseled Claimant on

an SI joint fusion as opposed to spine surgery. (CX 1, p. 7-8). An SI joint fusion could relieve thirty-five percent of Claimant's pain, and Claimant stated that he would consider the option. *Id*. at 7. More x-rays taken on June 28, 2000, revealed that Claimant was developing syndesmophytes at several levels, facet arthritis at L5-S1, calcification of the aorta extending into the illiac arteries and Claimant was developing sclerosis around his SI joints. *Id*. Because Dr. Flood was retiring and leaving the area, he left Claimant in the case of Dr. Rauschwerk. *Id*.

On August 23, 2000, Dr. Rauschwerk diagnosed symptomatic lumbar disc displacement with S1 radiculopathy and L5 radiculitis. (CX 1, p. 6). Dr. Rauschwerk recommended that Claimant seek treatment for an abdominal aneurism and undergo surgical treatment for his lumbar disc pathology and radiculopathy/radiculitis, which would relieve sixty to seventy percent of his leg pain. *Id*. L4-3 needed an arthroscopic microdiscectomy and L5-S1 presented significant problems because Claimant had a very large transverse process making surgery very difficult. *Id*. Dr. Rauschwerk opined that Claimant remained totally and permanently disabled. *Id*. Any treatment Dr. Rauschwerk had planned, however, needed to wait while Claimant underwent treatment for a cardiovascular problems in the fall and winter of 2000-01. *Id*. at 5.

On April 8, 2001, Claimant presented to Dr. Rauschwerk following bypass surgery at Charity Hospital and Dr. Rauschwerk ordered a new MRI. (CX 1, p. 4). Dr. Rauschwerk did not see Claimant again, however, until March 18, 2002, because his insurance company would not pay his bill. *Id*. at 3.

(2) Medical Records of Dr. Robert A. Steiner

Dr. Steiner, an orthopaedic surgeon, conducted a second opinion evaluation of Claimant on February 25, 1999. (EX 4, p. 1). On physical examination, Dr. Steiner did not observe any acute distress, but Claimant demonstrated only twenty degrees of flexion and ten degrees of extension of his lumbar spine and had positive straight leg raises. *Id*. Reviewing Claimant's MRIs from 1992 and 1998, Dr. Steiner did not detect any change and reported that Claimant had a diffuse annular bulge and facet hypertrophy at L4-5, and a mild central bulge at L5-S1 with a decreased signal intensity at both levels. *Id*. at 2. Dr. Steiner opined that Claimant had degenerative lumbar disc disease without neurologic deficit or radicular findings. *Id*. Dr. Steiner did not recommend surgery, and in light of his degenerative changes, Claimant could only engage in light work activities avoiding repetitive bending, stooping and lifting over twenty pounds. *Id*.

After reviewing a video tape of Claimant undertaking home repair activities, Dr. Steiner reported on November 5, 1999, that Claimant was able to repetitively bend, stoop, and lift without difficulty. (EX 4, p. 4). Claimant was certainly not a candidate for surgery and Dr. Steiner opined that Claimant could return to his former job as a shipfitter. *Id*. Dr. Steiner further opined that Claimant's functional capacity examination revealed minimal symptom exaggeration and equivocal inappropriate illness behavior, thus, other data was necessary to in making decisions regarding vocational rehabilitation. *Id*.

On July 27, 2000, Dr. Steiner performed another second opinion medical evaluation of

Claimant on behalf of Employer. (EX 4, p. 5). Claimant did not appear in any acute distress, and Claimant had forty degrees of motion on flexion, ten degrees on extension, ten degrees on lateral bending, and Claimant had positive straight leg raises. *Id*. at 5-6. Reviewing x-rays of Claimant's lumbar spine, Dr. Steiner detected anterior and lateral spurring at L3-4, L4-5, and L5-S1 with facet hypertrophy and sclerosis at each level. *Id*. at 6. Claimant also had mild disc space narrowing at L5-S1, and degenerative changes in his sacroiliac joints. *Id*. Based on his review, Dr. Steiner reiterated that surgery was not recommended and a new functional capacity exam was appropriate. *Id*. Claimant was capable of light duty work but until the functional capacity exam was performed, he should avoid repetitive bending, stooping, lifting and Claimant should limited himself to lifting no more than twenty pounds. *Id*.

On June 28, 2001, Dr. Steiner reported that he had reviewed Claimant's recent functional capacity exam and stated that the exam did not provide a true representation of Claimant's residual functional capacity. (EX 4, p. 8). Based on Claimant's degenerative lumbar changes, Dr. Steiner advised that Claimant not exceed the light to light-medium category of physical work and not lift over twenty to thirty pounds occasionally. *Id*.

(3) Medical Records of Dr. Kevin J. Bianchini

On November 1, 2001, Claimant presented to Dr. Bianchini, a specialist in neuropsychology, clinical psychology and behavioral medicine, for a pain/psychological evaluation on the request of Employer. (EX 7, p. 1-2). Claimant self-rated his pain a 7-8 on a ten point scale and told Dr. Bianchini that he had to buy drugs off the street after the workers' compensation carrier refused to make his doctor's appointments. *Id*. at 2. Claimant's daily medication consisted of 1000mg of fish oil once a day, 350 mg of Soma twice a day, Vicodin one to three times a day, 20 mg of Pravachol once a day and 350 mg of Carisoprocol three times a day. *Id*. at 3.

The results of WAIS-II testing revealed that Claimant had an average intelligence score. (EX 7, p. 7). Claimant's results did not demonstrate any attempt to feign a cognitive impairment. *Id*. at 8. In tests designed to measure social-emotional functioning, Claimant responses indicated that he felt as if he had a wider variety and greater intensity of symptoms than those typically seen in clinical patients. *Id*. at 9. Although the testing was somewhat inconsistent, Dr. Bianchini thought that Claimant may be malingering and/or exaggerating his symptoms. *Id*. The fact that Claimant stated that he wanted to settle his legal case, combined with the fact that other physicians and the functional capacity evaluator found non-organic signs of illness, led Dr. Bianchini to conclude that Claimant was not motivated to return to work. *Id*. at 10. Also, Dr. Bianchini stated that Claimant was likely aware of the difference between his actual physical activity, as depicted on the investigative video tape, and his reported symptoms, meaning that Claimant was malingering. *Id*. In sum, Claimant did not have any disabling psychological or cognitive problmes to prevent him from returning to work. *Id*.

(4) May 25, 2001 Functional Capacity Examination

On May 25, 2001, Claimant presented to WorkSaver Industrial Safety and Rehabilitation for a functional capacity examination administered by physical therapist Karmen R. Wolverton and reviewed by Dr. Richard W. Bunch. (EX 6, p. 1). The amount of physical exertion Claimant could exert was not ascertainable due to a sub-maximal effort during the evaluation, however, Claimant demonstrated the abilities to tolerate activities at a sedentary demand level. *Id*. at 2. Claimant also refused to take several tests that involved crawling, stair climbing, ladder climbing, and kneeling. *Id*. Furthermore, the examiner reported that there was significant evidence of non-organic illness behavior and Claimant may have attempted to control the results of his evaluation. *Id*.

Claimant's measured functional capacity was such that he could grasp, manipulate objects, and move his hands and feet without restriction. (EX 6, p. 4). Claimant could frequently walk, and occasionally sit, stand, flex his trunk and balance. *Id*. When Claimant presented for his functional capacity exam he self rated his pain a 6 on a ten point scale, and when he finished on the first day of testing, he rated his pain an 8. *Id*. at 15. Claimant's pre and post-exam pain diagrams were consistent. *Id*. On his Wadell tests, which indicate whether a person may be engaging in symptom magnification, Claimant tested positive in five out of five tests. *Id*. at 17. Claimant presented a non-dermatonal pain pattern, presented positive results for non-organic clinical findings, positive findings for symptom behavior suggestive of non-organic illness behavior, and positive findings for overt pain behaviors, all signs highly suggestive of non-organic symptoms illness behavior and psychological overlay. *Id*. at 17-18. Claimant also scored positive results on twelve of nineteen tests suggesting that Claimant had a high probability of disability magnification behavior. *Id*. at 19.

On June 12, 2001, Claimant underwent a functional abilities evaluation. (EX 6, p. 25). On a static ten second far arm lift test, Claimant gave a varied effort, averaging 7.4 lbs., and self rated his pain as an eight on a ten point scale during the test. *Id*. at 26. Claimant's effort on the ten second near arm lift was also varied, reaching an average force of 15.1 lbs. *Id*. at 27. On the ten second static pull, Claimant's peak performance reached 30.2 lbs., in a consistent effort without any change in his pain level. *Id*. at 28. On the ten second push, Claimant asserted 22.6 lbs. of force in a somewhat varied effort reporting a slight increase in pain. *Id*. at 29. On the occasional axial rotation reach, occasional crouching/squatting reach, and occasional kneeling to standing and back reach tests, Claimant sated that he could not tolerate the activity due to pain. *Id*. at 30-31. Claimant received a "below competitive" score of zero on the occasional stooping reach test and a zero score on the occasional upper level reach test. *Id*. at 31-32.

By comparison, Dr. Flood in a physician's functional capacity evaluation dated May 13, 1998, dictated that claimant could frequently/carry lift up to ten pounds, frequently grasp and drive an automatic vehicle, occasionally sit stand and walk, and Claimant could never twist, climb, kneel, stoop, crawl or reach. (EX 6, p. 33). Dr. Flood prohibited Claimant from pushing and pulling, and stated that Claimant must be allowed to sit at his request. *Id*. at 34. Dr. Flood further prohibited Claimant from working around unprotected heights, fumes, gases, chemicals, radiation, and moving machinery. *Id*.

(5) Testimony and Vocational Reports of Tami Shilling from Deist Riggle & Associates

Ms. Shilling, a seven year vocational counselor for Riggle & Associates, had attempted to find alternative employment for Claimant since 1998. (Tr. II, p. 41-42). Claimant's achievement tests all measured in the average range for his age and he could read on the twelfth grade level. (Tr. II, p. 43). Based off Claimant's early functional capacity examination, and his work restrictions of no lifting above ten pounds, no twisting, climbing, kneeling, stooping, crawling, frequent grasping, pushing, pulling, and dictates to alternate sitting, standing, and not to operate anything other than an automatic vehicle, Ms. Shilling attempted to locate suitable jobs for Claimant. (Tr. II, p. 44-45).

(1) Home Choice - Customer Service. Available on September 23, 1998, this position was located in Bogalusa, Louisiana, at $6.00 per hour, forty hours per week, and lifting was under ten pounds. The job required good people skills, was sedentary, required Claimant to push pull and stoop on a rare basis, sit, walk and reach on an occasional basis, and stand and grasp on a frequent basis. The job entailed greeting customers, answering telephones, showing merchandise, data entry and sales transactions. No lifting or moving of merchandise was required and Claimant could alternate sitting and standing. (Tr. II, p. 45-56; EX 5, p. 98-99).

(2) National Home Furnishings - Salesperson. Available on November 18, 1998, this position was located in Bogalusa, Louisiana. The position paid $6.00 per hour, was full time and required on to that the applicant be able to read and write. Ordinarily the position required the employee to move showroom furniture, but the employer was wiling to modify the position if the right person was unable to physically meet that requirement. Claimant would have to rarely push, pull and stoop, occasionally sit, stand, walk, and reach, and frequently grasp objects such as a pen. *Id*. The employee was expected to be able to greet customers, show merchandise, establish rental agreements, perform data entry, answer telephones, and finalize transactions. (EX 5, p. 100 Tr. II, p. 46).

(3) Kennedy's Decorating Center - Inside and outside sales. This is a full time position requiring basic reading, writing, and math skills, but a high school diploma or GED is not required. The current salary range is $250.00 per week base pay plus commission. This salary range has remained the same since 1995. The position required no lifting over ten pounds, occasional reaching and some twisting, climbing, kneeling, and stooping. Driving to various customer homes is required, but there are frequent breaks in the driving. On-the-job training is provided. This position was analyzed on February 19, 1999. The position was actually available on the following dates: January 21, 1996; February 4, 1996; February 11, 1996; February 25, 1996; July 7, 1996; July 28, 1996; August 4, 1996; and August II, 1996. (Tr. II, p. 50; EX 5, p. 84).

(4) Security Finance - Assistant Manager. This is a full time position that requires a high school diploma or GED. On-the-job training is provided for this position, and it required occasional stooping, and some twisting, climbing, kneeling and lifting up to twenty pounds. This position was originally analyzed on April 10, 1995 and revisited on February 19, 1999 for an updated JA. The 1995 salary was approximately $5.00 an hour, and the current salary is $6.00 an hour. This position was available on the following dates: December 4, 1994;

December 11, 1994; March 12, 1995; April 2, 1995; April 10, 1995; May 4, 1997; June 29, 1997,and February 19, 1999. (Tr. II, p. 49, 53; EX 5, p. 71, 91).

(5) Travel World International - Customer Service. This is a full time position that was analyzed on February 25, 1999 to be in the sedentary level of work. This position offers on-the-job training for all aspects of the job, including some computer work. A high school diploma or GED is preferred but not required. The job required climbing, stooping and occasional reaching. This position was available on November 13, 1994. The past salary range was $4.75 to $5.00 an hour, and the current range is $5.50 to $6.00 an hour. (Tr. II, p. 52; EX 5, p.80).

(6)Movie World - Assistant Manager. This is a thirty hour per week position that requires a high school diploma or GED. This position offers on-the-job training and requires no lifting over ten pounds. The employee can also alternate sitting, standing, and walking, but the job required occasional stooping. The starting salary range has always been minimum wage with opportunities for advancement. This position was available on June 15, 1997 and was analyzed on February 25, 1999. (Tr. II, p. 51-52; EX 5, p.82).

(7) Sunbelt Credit - Assistant Manager. This is a full time sedentary position that offers on-the-job training. A high school diploma or GED is required. The job required some stooping and climbing, and it required occasional driving. The 1995 salary was $5.00 an hour, and the current starting salary range is minimum wage to $6.00 an hour. This position was visited on January 25, 1995; April 10, 1995; and February 19, 1999 to obtain JA information. The position was available on the following dates: November 27, 1994; December 11, 1994; December 18, 1994; January 1, 1995; January 8, 1995; January 22, 1995; January 29, 1995; February 5, 1995; February 12, 1995; February 26, 1995; March 5, 1995; March 26, 1995; April 2, 1995; April 9, 1995; April 16, 1995; April 23, 1995; April 30, 1995; July 28, 1996; August 4, 1996; August 11, 1996; October 27, 1996; May 25, 1997; and February 19, 1999. (Tr. II, p. 49; EX 5, p. 86).

(8) Seven Acres Substance Abuse Clinic - Night Attendant. This is a thirty-two hour per week sedentary position located in Pine, Louisiana, that was analyzed on January 5, 1999. This position also was available in 1996, according to the director. No high school diploma or GED is needed. The position has always paid minimum wage, was sedentary, required no lifting over ten pounds, rarely required Claimant to reach, required walking, standing, and grasping on an occasional basis and required sitting on a continuous basis. The job was lasted from midnight to 8:00 a.m., during which time the employee could read a book. The employer stated that there were no combative clients because the facility was voluntary, and the job was perfect for a retiree because there were no physical demands. (Tr. II, p. 47; EX 5, p. 65, 102).

(9) North Park Car Wash - Cashier. This is a full time light level job with a 1998 starting salary of $5.25 an hour. The employee must be able to read, write, and count money. A padded chair is provided behind the counter, and the position required some stooping,

occasional reaching, and some lifting up to twenty pounds. The position was available and analyzed on May 19, 1998. The job was also available on November 6, 1994. (Tr. II, p. 55; EX 5, p.72).

(10) St. Tammany Council on Aging - Dispatcher/Clerk. This is a full time sedentary position with a minimum wage salary in Covington, Louisiana. The job requires some stooping, and occasional reaching. The prospective employee must have a pleasant disposition. Training is provided, and a high school diploma or GED is not required. The position was available and analyzed on March 2, 1998. (Tr. II, p. 55; EX 5, p.74).

(11) The Answerphone System - Telephone Operator. This position consists of an answering service for area businesses and was located in Covington, Louisiana. The job is full time with eight hour shifts that paid $5.95 per hour during the day and $6.45 per hour at night. The position was analyzed on July 1, 1998, as being sedentary, requiring only occasional "level" reaching and no lifting. The position required constant sitting, but the employee could periodically stand as needed. Training was provided, but the employee must be able to type at twenty words per minute. The position was available on November 5, 1995; November 12, 1995; November 19, 1995; November 26, 1995; December .10, 1995; December 17, 1995; December 24, 1995; January 14, 1996; February 4, 1996; March 17, 1996; April 14, 1996; May 12, 1996; July 14, 1996; August 26, 1996. (Tr. II, p. 54; EX 5, p. 76).

(12) Central Financial Services, Inc. - Manager Trainee/Collector - Available on August 4, 1999, this job required some climbing, stooping, and occasional driving. The job was full time and sedentary. Pay was $6.00 per hour and after Ms. Shilling related Claimant's work background, age, and physical limitations, the potential employer requested a resume'. (Tr. II, p. 48 EX 5, p. 95).

(13) Family Check Advance, L.C.C. - Customer Service - Located in Picayune, Mississippi, the position did not require a GED, offered on the job training, and was mostly sedentary with rare home visits. *Id*. The position was available on October 10, 2000, part-time, twenty to thirty hours a week, and paid $6.50 to $7.00 an hour. *Id*. The position required occasional lifting up to twenty pounds, some carrying of up to twenty pounds, and some twisting, climbing and stooping. Claimant would be required to reach and drive on an occasional basis. (Tr. II, p. 59; EX 5, p. 35-36).

(14) Trinity Marine Products - Based on Dr. Steiner's opinion that Claimant could return to work as a shipfitter, heavy employment, Ms. Shilling identified a position with in Madisonville, Louisiana. Training was provides and the job paid $9.50 to $13.50 per hour depending on experience. (EX 5, p. 42).

(15) Best Equipment Technologies - Located in Popularville, Mississippi. This job required a minimum of fifty hours per week and paid a salary of up to $11.00 per hour. The job was described as hot, heavy work, and Claimant would have to be tested to see if he could qualify. (EX 5, p. 42).

(16) Conoco Station & Convenience Store - Cashier - Available on September 10, 2001, in Picayune, Mississippi, this job offered a thirty hour of work a week at the rate of $5.15 per hour. The job required a light-medium level of exertion and provided a padded stool. Dr. Steiner, however, refused to approve the position because it required lifting in the range of twenty to fifty pounds. (EX 5, p. 53-54).

(17) Service Zone - Computer Service Representative - Located in Bogalusa, Louisiana, and available on October 9, 2001, this job was sedentary, paid between $7.00 and $8.00 per hour, and required computer proficiency before a candidate could apply. (EX 5, p. 54).

(18) CCP., LLC - Telephone Collections - Located in Picayune, Mississippi and available in May 2002, this was a sedentary position paying $7.00 per hour. The job required occasional reaching, some climbing of the business steps, and lifting was limited to a telephone receiver. A padded chair was provided, Claimant received a one hour lunch break and two fifteen minute breaks and had opportunities to stand and stretch.. The job consisted of selling the businesses commercial debt collection service to other businesses in an effort to gain new customers. (Tr. II, p. 61-62; CX 5, p. 3-4).

At the formal hearing, Ms. Shilling testified that she had called C.C.P. Finance to make sure that Claimant had applied for the May 2002 job. (Tr. II, p. 61). An employee of C.C.P. stated that Claimant had applied and that he had brought his medical records in at the time of application. (Tr. II, p. 61-62). Ms. Shilling stated that it was not appropriate for a perspective employee to discuss his medical condition with a prospective employer at the time of the application, and the fact that Claimant brought his medical records to an interview demonstrated a half-hearted effort to obtain a job. (Tr. II, p. 62, 72). Additionally, Ms. Shilling reported that Claimant was discussing his need to avoid walking, squatting, and stooping with the prospective employer at Family Check Advance, indicating to Ms. Shilling that Claimant was not presenting himself in a positive way. (EX 5, p. 40). Claimant never sought the assistance of Ms. Shilling in applying for a job. (Tr. II, p. 63).

Ms. Shilling had difficulty locating alternative jobs for Claimant in his locality after August 2001 because a local employer in Claimant's vicinity had recently laid off over one-hundred workers making the job market was very competitive. (EX 5, p. 48). On November 16, 2001, Ms. Shilling stated that available jobs in Claimant's local consisted of fast food positions, construction work, truck driver/mechanic, and temporary Christmas stock personnel. *Id*. Ms. Shilling opined that all of these positions were beyond Claimant's physical capabilities. *Id*. at 56.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he is permanently and totally disabled as of July 21, 1999. Claimant

is totally incapable of performing his former job as a shipfitter because it was a job that required heavy labor and Claimant's treating physician has determined that Claimant is permanently and totally disabled. Claimant asserts that Employer's physician, Dr. Steiner is internally inconsistent, recommending at one time that Claimant return to his former employment, and recommending at a later time that Claimant be limited to light duty work. Claimant also contends that after Judge Mills held the original formal hearing in 1996, when Claimant was limited to very light or sedentary work, Claimant condition deteriorated so that he is totally incapable of returning to any employment. Finally, Claimant contends that he had applied for every position identified by Ms. Shilling but none of the position she listed were available for him.

Employer contends that it has identified suitable alternative employment for Claimant sufficient to reduce his temporary total award to a permanent partial disability award and/or that Claimant could resume his former job. Although Claimant denied performing any work on his property in his deposition, the video tape by Employer's investigator showed otherwise, and Claimant was at least capable of working three hours straight. Employer also asserted that Claimant engaged in disability magnification behavior as established in his functional capacity exam, and Dr. Steiner reported that Claimant could perform work in the light-medium level of exertion. Employer contends that Claimant did not diligently pursue any job lead provided to him by Ms. Shilling because Claimant brought his medical records when he made the application.

B. Nature & Extent of Injury and Date of Maximum Medical Improvement

Claimant seeks continuing temporary total disability benefits from February 21, 1992 to July 21, 1999, and continuing permanent total disability benefits thereafter . Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington*

Metropolitan Area Transit Authority, 13 BRBS 446 (1981).

C(1) Nature of Claimant's Injury

Following Claimant's workplace accident on February 13, 1992, Dr. Long opined on March 13, 1992, that Claimant had mild lumbar stenosis at L4-5 due to an annular bulge. In May 1992, Claimant's condition deteriorated such that on May 18, 1992, Dr. Steiner reported that Claimant had anterior osteophytic lipping at L3-4 and L4-5, lateral osteophytic spurring at L1-2, L2-3, minor bulging at L4-5, and decreased signal intensity at L5-S1. In June 1992, Clamant's treating physicain Dr. Davis, stated that Claimant had anterior bone spurs at L3, L4, and L5, scelerosis at L5-S1, lumbar spondylolsis, degenerative disc disease, and a protruding disc at L5-S1 with radiculitis and radiculopathy. By August 1992, Claimant's L4-5 disc was herniated and osteoarthritis was detected L5-S1. In Septemebr 1992, Dr. Davis thought that Claimant's L5-S1 disc was herniated and compressing his nerve root. On a January 1997 MRI report, Clamant's back revealed evidence of disc bulging at L4-5 and a collapsed disc resulting in a bulge of the disc anulus at L5-S1. *See Stout v. Equitable/Halter Marine, Inc.*, 1996 LHC 923 (1997).

On a November 20, 1998 MRI , Dr. Flood detected a herniated disc at L5-S1, a bulging disc at L4-5 and spondylolysis at L5-S1. (CX 1, p. 10). In July 1999, Dr. Flood noted that multiple osteophytes were increasing and Claimant had aortic calcification. *Id*. at 9. On June 28, 2000, Dr. Flood interpreted x-rays revealing that Claimant was developing syndesmophytes at several levels, facet arthritis at L5-S1, calcification of the aorta extending into the illiac arteries and Claimant was developing sclerosis around his SI joints. *Id*. On August 23, 2000, Dr. Rauschwerk stated that Claimant needed surgical treatment for his lumbar disc pathology and radiculopathy/radiculitis. *Id*. at 6. L4-3 needed an arthroscopic microdiscectomy and L5-S1 presented significant problems because Claimant had a very large transverse process making surgery very difficult. *Id*.

Reviewing Claimant's MRIs from 1992 and 1998, Dr. Steiner did not detect any change and reported that Claimant had a diffuse annular bulge and facet hypertrophy at L4-5, and a mild central bulge at L5-S1 with a decreased signal intensity at both levels. *Id*. at 2. Dr. Steiner opined that Claimant had degenerative lumbar disc disease without neurologic deficit or radicular findings. *Id*.

Accordingly, I find that the nature of Claimant's injury at the present time is: disc bulging at L4-5 with facet hypertropathy, osteophytic spurring, and calcification of the aorta; a herniated or mildly bulging disc at L5-S1 with a collapsed disc space, spondylolysis, scelerosis, degenerative disc disease facet arthritis, osteoarthritis, decreased signal; radiculitis/radiculopathy originating from the L5-S1 disc with possible nerve root compression[3]; multiple osteophytes from L1-L5; syndesmophytes

[3] I give little weight to Dr. Steiner's statement on February 25, 1999, that Claimant did not have radicular findings in light of his own physical exam demonstrating positive straight leg raises, Claimants' complaints of radiating pain into his both legs, Claimant's diagnostic findings showing tht the L5-S1 disc is likely compressing his nerve root, and the statements of Claimant's

at several levels; and S1 scelerosis.

C(2) Extent of Claimant's Injury

In his April 30, 1997 Decision and Order, Judge Mills determined that the extent of Claimant's existing injury noting that Claimant had not reached maximum medical improvement:

> In review of each physicians restrictions, I find that Claimant is capable of working, although only at a very light or sedentary level. I do not agree with Dr. Davis or the functional capacity evaluation which finds Claimant essentially unable to work. Nor do I agree with Dr. Murphy in that Claimant is capable of working a medium duty job. In essence, I find Dr. Flood's opinion to the better reasoned and his restrictions to be the most realistic given the circumstances. Thus, I find that Claimant is only suited for sedentary employment although occasionally, as Dr. Flood stated, "sometimes things can be just a little bit more than sedentary..." I also agree with Dr. Flood 's opinion that Claimant's driving should be limited to 20-30 minutes as his back condition is likely to be aggravated by a long period of sitting combined with the vibrations of driving. [Judge Mills found that Dr. Flood's restrictions were the most well reasoned when Dr. Flood opined that Claimant could occasionally sit, stand, and walk, but should never bend, reach, squat, kneel or crawl, and Claimant should limit his driving to 20-30 minutes.]

Stout v. Equitable/Halter Marine, Inc., 1996 LHC 923 (1997).

Subsequently, Dr. Flood stated on May 28, 1997 that Claimant's medical condition remained unchanged, opining that Claimant was capable of "light type work." (CX 1, p. 13). On March 24 & 31, 1998, private investigator John LaPointe captured video surveillance showing Claimant "continuously bending and stooping" while installing an electrical line to his house and performing minor repairs to his roof while standing on a ladder. (EX 8, p. 1). On March 14, 1998, Claimant's activities took place intermittently from 12:51 p.m. to 2:21 p.m., and Mr. LaPointe captured Claimant periodically using a long handled shovel from 1:57 p.m., to 2:16 p.m digging a fourteen foot long trench, four to six inches deep, to bury an electrical cable. (Tr. II, 100-01; EX 8, p. 1). On March 31, 1998, Mr. Lapoint's did not find Claimant engaged in any activity until 10:10 a.m., when Claimant was moving a ladder, climbing the ladder and tacking what appears to be roofing felt on his porch roof. (EX 8). This activity stopped 10:23 a.m., and at 10:53 a.m. Mr. LaPointe captured Claimant picking up posthole diggers, a shovel, and a chair, and at 10:57 a.m. Claimant appeared to be looping a cable or an extension cord in his hand. (EX 8). Claimant testified that the trench he dug measured fourteen feet, the two-inch PVC piping that he was carrying weighed six pounds, and the ladder weighed twenty-one pounds, the cable weighed wight pounds, and the twenty-six feet of piping he

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treating physicians, Drs. Davis, (opining in June 1992 that Claimant probably had right nerve radiculitis), and Rauschwerk (opining on August 23, 2000, that Claimant had S1 radiculopathy and L5 radiculitis).

carried in a roll weighed thirteen pounds. (Tr. II, p. 100).

Dr. Flood, in a physician's functional capacity evaluation dated May 13, 1998, dictated that claimant could frequently/carry lift up to ten pounds, frequently grasp and drive an automatic vehicle, occasionally sit stand and walk, and Claimant could never twist, climb, kneel, stoop, crawl or reach. (EX 6, p. 33). Dr. Flood prohibited Claimant from pushing and pulling, and stated that Claimant must be allowed to sit at his request. *Id*. at 34. Dr. Flood further prohibited Claimant from working around unprotected heights, fumes, gases, chemicals, radiation, and moving machinery. *Id*.

On February 25, 1999, Dr. Steiner recommend in light of Claimant's degenerative changes, Claimant could only engage in light work activities avoiding repetitive bending, stooping and lifting over twenty pounds. (EX 4, p. 2). On July 21, 1999, Dr. Flood changed Claimant work status for the first time since July 29, 1994, from light work to total and permanent disability.[4] (CX 1, p. at 9, 16). After reviewing a video tape of Claimant undertaking home repair activities, Dr. Steiner reported on November 5, 1999, that Claimant was able to repetitively bend, stoop, and lift without difficulty and could return to his former job as a shipfitter. (EX 4, p. 4). Dr. Steiner further opined that Claimant's functional capacity examination revealed minimal symptom exaggeration and equivocal inappropriate illness behavior, thus, other data was necessary to in making decisions regarding vocational rehabilitation. *Id*.

On July 27, 2000, Dr. Steiner performed another second opinion medical evaluation of Claimant on behalf of Employer, opining that Claimant was capable of light duty work but until the functional capacity exam was performed, he should avoid repetitive bending, stooping, lifting and Claimant should limited himself to lifting no more than twenty pounds. (EX 4, p. 6). On August 23, 2000, Dr. Rauschwerk opined that Claimant remained totally and permanently disabled. (CX 1, p. 6).

On May 25, 2001, Claimant presented to WorkSaver Industrial Safety and Rehabilitation for a functional capacity examination. (EX 6, p. 1). The amount of physical exertion Claimant could exert was not ascertainable due to a sub-maximal effort during the evaluation, however, Claimant demonstrated the abilities to tolerate activities at a sedentary demand level. *Id*. at 2. The examiner reported that there was significant evidence of non-organic illness behavior and Claimant may have attempted to control the results of his evaluation. *Id*.

Claimant's ascertainable functional capacity was such that he could grasp, manipulate objects and move his hands and feet without restriction. (EX 6, p. 4). Claimant could frequently walk, and occasionally sit, stand, flex his trunk, and balance. *Id*. On his Wadell tests, which indicate whether a person may be engaging in symptom magnification, Claimant tested positive in five out of five tests.

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[4] In Dr. Flood's January 22, 1997 deposition, he stated that his secretaries filled out a form after each visit and the form only had four choices: totally and permanently disabled, temporarily totally disabled, light work, and regular work. (CX 3, p. 19). In actuality, Dr. Flood had Claimant restricted to sedentary type work. *Id*.

Id. at 17. Claimant presented a high probability of having non-organic symptoms, illness behavior or psychological overlay, scoring positive on twenty-five of thirty-five tests. *Id*. at 18. Claimant also scored positive results on twelve of nineteen tests suggesting that Claimant had a high probability of disability magnification behavior. *Id*. at 19.

On June 12, 2001, Claimant underwent a functional abilities evaluation. (EX 6, p. 25). On a static ten second far arm lift test, Claimant gave a varied effort, averaging 7.4 lbs., and self rated his pain as an eight on a ten point scale during the test. *Id*. at 26. Claimant's effort on the ten second near arm lift was also varied, reaching an average force of 15.1 lbs. *Id*. at 27. On the ten second static pull, Claimant's peak performance reached 30.2 lbs. in a consistent effort without any change in his pain level. *Id*. at 28. On the ten second push, Claimant asserted 22.6 lbs. of force in a somewhat varied effort reporting a slight increase in pain. *Id*. at 29.

On June 28, 2001, Dr. Steiner reported that he had reviewed Claimant's recent functional capacity exam and stated that the exam did not provide a true representation of Claimant's residual functional capacity. (EX 4, p. 8). Based on Claimant's degenerative lumbar changes, Dr. Steiner advised that Claimant not exceed the light to light-medium category of physical work and not lift over twenty to thirty pounds occasionally. *Id*.

(C)(2)(a) Weighing the Evidence

I find that Claimant was capable of sedentary to very light work[5] as described by Judge Mills

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[5] Sedentary Work is defined as: "Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th ed. 1991).

Light Work is defined as: "Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible." DICTIONARY OF OCCUPATIONAL TITLES

in his April 30, 1997 Decision and Order. Claimant's ability to perform light level work continued On May 13, 1998, Dr. Flood recommended work on a sedentary level of no lifting over ten pounds and the restrictions he provided were nearly identical to those relied on by Judge Mills. (EX 6, p. 33-34). Significantly, Claimant's condition remained largely unchanged from the date of Judge Mills' Decision and Order. The only new finding during this period was that Claimant complained of "a little bit of numbness down the back leg" in January 1998, and Dr. Flood continued his recommendation in his medical reports that Claimant could engage in "light" work.[6] (CX 1, p. 10-13). Dr. Steiner opined on February 25, 1999, that Claimant could engage in light duty work, but agreed with Dr. Flood's recommendation that Claimant could not twist, climb or crawl. (EX 4, p. 2; EX 6, p. 33-34). Dr. Steiner also agreed that Claimant should avoid repetitive bending, stooping and lifting. (EX 4, p. 2).

I attach no weight to Dr. Steiner's opinion on December 5, 1999 that Claimant could repetitively bend, stoop and lift without difficulty and could return to his former job as a shipfitter. (EX 4, p. 4). Dr. Steiner only made these remarks after viewing the video surveillance of Claimant working at his home. *Id*. As explained by Claimant and his daughter, Claimant had taken a large dose of pain medication before undertaking the work, and Claimant credibly testified that his activities caused him to seek bed rest. (Tr. II, p. 77-78, 102, 107-8). Claimant used a long handle shovel to dig a fourteen foot trench, he testified that the ground was soft and the trench was no deeper than six inches and no wider than necessary to bury a thin electrical cable, and the investigative videotape shows less than twenty-five minutes of shoveling activity. (Tr. II, p. 101). Furthermore, Claimant related that the PVC piping he carried weighted six pounds, the electrical cable was eight pounds, the twenty-six feet of rolled piping weighed thirteen pounds and his ladder weighed twenty-one pounds. (Tr. II, p. 100). I also note that Mr. LaPointe arrived at Claimant's location on March 24, 1998 at 9:00 a.m., but was only able to obtain limited footage of Claimant between the hours of 12:10 p.m. to 2:21 p.m. (EX 8, p. 1). Likewise, Mr. LaPointe arrived at Claimants' residence at 6:00 a.m. on March 31, 1998, but only captured Claimant performing limited activities between 10:53 a.m. and 11:32 a.m. *Id*. Mr. LaPointe's edited videotape - depicting all of Claimant's activities over the two day period - only contained forty-six minutes of footage. Thus, I do not find that Claimant's limited physical activities within a seven day time span constitute a reasonable basis for Dr. Steiner to find that Claimant could return to his former job.

On July 21, 1999, Dr. Flood changed Claimant's work limitations from light to totally and permanently disabled. (CX 1, p. 9). The only change in Claimant's physical condition to warrant a change in Claimant's work restrictions as of that date was increasing osteophytes at multiple spine levels, an incidental finding of aortic calcification, and subjective complaints of pain shooting into Claimant's groin. *Id*. Dr. Flood did not otherwise explain why he had changed Claimant's work status.

Appendix C (4th ed. 1991).

[6] *See supra*, footnote 4

Claimant's lumbar condition further deteriorated as evidenced June 28, 2000, when x-rays revealed that Claimant was developing syndesmophytes at several levels, facet arthritis at L5-S1, calcification of the aorta extending into the illiac arteries and Claimant was developing sclerosis around his SI joints. (CX 1, p. 7). Also, Claimant's May 25, 2001, functional capacity evaluation, limited by sub-maximal effort and signs of non-organic illness, demonstrated that Claimants' ability to work was diminished such that he could only tolerate work on a sedentary demand level, without any squatting, crawling, or kneeling. (EX 6, p. 2, 4-6).

I give little weight to Dr. Steiner's June 28, 2001 report after he had reviewed Claimant's functional capacity exam because Dr. Steiner actually increased the amount of work Claimant could do to lifting a maximum of twenty to thirty pounds, from a recommendation of a maximum lift of twenty pounds on February 25, 1999. (EX 4, p. 2, 8). Dr. Steiner related that his June 28, 2001 opinion was based on Claimant's degenerative lumbar changes, a condition that would not have improved from February 1999, and in fact had become worse as documented by Claimant's treating physicians.

Accordingly, based on the record as a whole, I find the medical evidence shows that Claimant is capable of sedentary to very light work until July 21, 1999 as determined by Judge Mills in his April 30, 1997 Decision and Order. After that period, I find that Claimant is capable of work only a sedentary basis where he can alternate sitting, standing and walking, and avoid activities all such as twisting, climbing, kneeling, stooping, crawling, reaching, and Claimant should limit his driving to twenty or thirty minutes using an automatic transmission. These restrictions are based on the limitations previously set by Dr. Flood, Claimant's deteriorating lumbar condition, the May 25, 2001, functional capacity evaluation, the investigative videotape, the recommendations of his treating physician, and Claimant's subjective reports of pain.

C(3) Date of Maximum Medical Improvement

On June 25, 1997, Claimant made a decision that he did not want to have any surgery in the foreseeable future, and Dr. Flood opined that Claimant had reached maximum medical improvement. (CX 1, p. 13). On July 21, 1999, Dr. Flood changed Claimant work status for the first time since July 29, 1994, from light work to total and permanent disability after Dr. Flood noted a adverse change in increasing osteophytes in Claimant's spine. *Id*. at 9, 16. Claimant also had aortic calcification and he complained about pain shooting in to his groin. *Id*. at 9. Accordingly, I find that Claimant reached maximum medical improvement on June 25, 1997, because Claimant indicated that he was not contemplating future surgery, Dr. Flood only intended to treat Claimant with medication, and Claimant's physical well being only deteriorated after that date.

D. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

D(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability

under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Here, Employer contends that Claimant was capable of returning to his former job as documented by Dr. Steiner. As explained, *supra*, Part C(2)(a), I attach no weight to Dr. Steiner's December 5, 1999 opinion. Because Claimant's former job constituted heavy work, and after his workplace injury the most Claimant was capable of performing was light work, I find that Claimant is unable to return to his former job and established a *prima faice* case of total disability.

D(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

D(2)(a) Claimant's Age Education and Experience

Claimant is 62 years old, has a 9th grade education with a GED, but tested as one of average intelligence by Dr. Bianchini. (EX 7, p. 1-2). Claimant also graduated from a welding and blueprint reading school at Jefferson Junior College, took a course in clinical hypnotherapy at St. John's University, and became an ordained minister to practice hypnotism. (Tr. II, p. 16). In the past, Claimant has worked as a boiler-maker, pipe-fitter, ship-fitter, and as a sheet-rock hanger. Claimant had also held jobs in a customer service/assistant manager position, and Claimant attempted, without success, to sell items from his home. (Tr. II, p. 38; EX 5, p. 6).

(D)(2)(b) Jobs in Claimant's Community

Employer's vocational expert presented the following jobs:

(1) Home Choice - Customer Service. Available on September 23, 1998, this position was located in Bogalusa, Louisiana, at $6.00 per hour, forty hours per week, and lifting was under ten pounds. The job required good people skills, was sedentary, required Claimant to push pull and stoop on a rare basis, sit, walk and reach on an occasional basis, and stand and grasp on a frequent basis. The job entailed greeting customers, answering telephones, showing merchandise, data entry and sales transactions. No lifting or moving of merchandise was required and Claimant could alternate sitting and standing.

I do not find that this job constitutes suitable alternative employment because it required Claimant to stoop, an activity prohibited by Claimant's restrictions before and after July 21, 1999.

(2) National Home Furnishings - Salesperson. Available on November 18, 1998, this position was located in Bogalusa, Louisiana. The position paid $6.00 per hour, was full time and required on to that the applicant be able to read and write. Ordinarily the position required the employee to move showroom furniture, but the employer was wiling to modify the position if the right person was unable to physically meet that requirement. Claimant would have to rarely push, pull and stoop, occasionally sit, stand, walk, and reach, and frequently grasp objects such as a pen. *Id*. The employee was expected to be able to greet customers, show merchandise, establish rental agreements, perform data entry, answer telephones, and finalize transactions.

I do not find that this position constitutes suitable alternative employment because it requires Claimant to stoop, an activity prohibited by Claimant's restrictions before and after July 21, 1999.

(3) Kennedy's Decorating Center - Inside and outside sales. This is a full time position requiring basic reading, writing, and math skills, but a high school diploma or GED is not required. The current salary range is $250.00 per week base pay plus commission. This salary range has remained the same since 1995. The position required no lifting over ten pounds, occasional reaching and some twisting, climbing, kneeling, and stooping. Driving to various customer homes is required, but there are frequent breaks in the driving. On-the-job training is provided. This position was analyzed on February 19, 1999. The position was actually available on the following dates: January 21, 1996; February 4, 1996; February 11, 1996; February 25, 1996; July 7, 1996; July 28, 1996; August 4, 1996; and August 11, 1996.

I do not find that this job constitutes suitable alternative employment because Employer made no showing that Claimant's driving would be limited would be able to drive an automatic vehicle as Dr. Flood required and the job required stooping and kneeling.

(4) Security Finance - Assistant Manager. This is a full time position that requires a high school diploma or GED. On-the-job training is provided for this position, it required occasional stooping, some twisting, climbing, kneeling, and required lifting up to twenty pounds. This position was originally analyzed on April 10, 1995 and revisited on February 19, 1999 for an updated JA. The 1995 salary was approximately $5.00 an hour, and the current salary is $6.00 an hour. This position was available on the following dates: December 4, 1994; December 11, 1994; March 12, 1995; April 2, 1995; April 10, 1995; May 4, 1997; June 29, 1997, and February 19, 1999.

I do not find that this position constitutes suitable alternative employment because it requires climbing, kneeling, stooping, and lifting over ten pounds.

(5) Travel World International - Customer Service. This is a full time position that was analyzed on February 25, 1999, as sedentary. This position offers on-the-job training for all aspects of the job, including some computer work. A high school diploma or GED is preferred but not required. The job required climbing, stooping, and occasional reaching. This position was available on November 13, 1994. The past salary range was $4.75 to $5.00 an hour, and the current range is $5.50 to $6.00 an hour.

I do not find that this job constitutes suitable alternative employment because it requires climbing, stooping and occasional reaching.

(6)Movie World - Assistant Manager. This is a thirty hour per week position that requires a high school diploma or GED. This position offers on-the-job training and requires no lifting over ten pounds. The employee can also alternate sitting, standing, and walking, but required occasional stooping. The starting salary range has always been minimum wage with

opportunities for advancement. This position was available on June 15, 1997 and was analyzed on February 25, 1999.

I do not find that this job constitutes suitable alternative employment because it requires occasional stooping.

(7) Sunbelt Credit - Assistant Manager. This is a full time sedentary position that offers on-the-job training. A high school diploma or GED is required. The job required some stooping and climbing, and it required occasional driving. The 1995 salary was $5.00 an hour, and the current starting salary range is minimum wage to $6.00 an hour. This position was visited on January 25, 1995; April 10, 1995; and February 19, 1999 to obtain JA information. The position was available on the following dates: November 27, 1994; December 11, 1994; December 18, 1994; January 1, 1995; January 8, 1995; January 22, 1995; January 29, 1995; February 5, 1995; February 12, 1995; February 26, 1995; March 5, 1995; March 26, 1995; April 2, 1995; April 9, 1995; April 16, 1995; April 23, 1995; April 30, 1995; July 28, 1996; August 4, 1996; August 11, 1996; October 27, 1996; May 25, 1997; and February 19, 1999.

I do not find that this job constitutes suitable alternative employment because it required some stooping and climbing and Employer did not show that Claimant's driving would be limited to an automatic vehicle.

(8) Seven Acres Substance Abuse Clinic - Night Attendant. This is a thirty-two hour per week sedentary position located in Pine, Louisiana, that was analyzed on January 5, 1999. This position also was available in 1996, according to the director. No high school diploma or GED is needed. The position has always paid minimum wage, was sedentary, required no lifting over ten pounds, rarely required Claimant to reach, required walking, standing, and grasping on an occasional basis and required sitting on a continuous basis. The job was lasted from midnight to 8:00 a.m., during which time the employee could read a book. The employer stated that there were no combative clients because the facility was voluntary, and the job was perfect for a retiree because there were no physical demands.

I find that this job constitutes suitable alternative employment from January 5, 1999, and continuing. Pine, Louisiana is within a reasonable commuting distance of Claimant's home in Crossroads, Mississippi. No pushing, pulling, twisting, climbing, kneeling, stooping, crawling , or driving was required. Claimant was required to lift a telephone receiver and he could alternate sitting and standing. Claimant's advanced age is not a deterrent for him in obtaining this job as the employer indicated a preference for retirees. Ms. Shilling did not present sufficient information to show that the job was available at an earlier date. Accordingly, Employer established suitable alternative employment on January 5, 1999, at $5.15 per hour, the federal minimum wage since September 1, 1997, or $164.80 per week. *See* U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Compliance Assistance - Fair Labor Standards Act*

(FLSA)<http://www.dol.gov/esa/whd/flsa> (visited Nov. 8, 2002).

> (9) North Park Car Wash - Cashier. This is a full time light level job with a 1998 starting salary of $5.25 an hour. The employee must be able to read, write, and count money. A padded chair is provided behind the counter, and the position required some stooping, occasional reaching and some lifting up to twenty pounds. The position was available and analyzed on May 19, 1998. The job was also available on November 6, 1994.

I do not find that this job constitutes suitable alternative employment because it requires Claimant to stoop. It also required Claimant to lift up to twenty pounds in violation of his work restrictions.

> (10) St. Tammany Council on Aging - Dispatcher/Clerk. This is a full time sedentary position with a minimum wage salary in Covington, Louisiana. The job requires some stooping, and occasional reaching. The prospective employee must have a pleasant disposition. Training is provided, and a high school diploma or GED is not required. The position was available and analyzed on March 2, 1998.

I do not find that this job constitutes suitable alternative employment because it required some stooping and occasional reaching.

> (11) The Answerphone System - Telephone Operator. This position consists of an answering service for area businesses and was located in Covington, Louisiana. The job is full time with eight hour shifts that paid $5.95 per hour during the day and $6.45 per hour at night. The position was analyzed on July 1, 1998, as being sedentary, requiring only occasional "level" reaching and no lifting. The position required constant sitting, but the employee could periodically stand as needed. Training was provided, but the employee must be able to type at twenty words per minute. The position was available on November 5, 1995; November 12, 1995; November 19, 1995; November 26, 1995; December .10, 1995; December 17, 1995; December 24, 1995; January 14, 1996; February 4, 1996; March 17, 1996; April 14, 1996; May 12, 1996; July 14, 1996; August 26, 1996.

I do not find that his position constitutes suitable alternative employment based on Claimant's educational level. Claimant has a ninth grade education with a GED, and the records does not contain any evidence that Claimant could type twenty words per minute. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981) (stating the employer must show that work is available within the claimant's physical ability, educational ability, age, and experience); *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21, 29 (1979) (finding that the refusal to undergo rehabilitation training is not a factor in determining the extent of a claimant's disability). Without the ability to type twenty words per minute, I do not find that Claimant can

realistically and likely secure the position.

(12) Central Financial Services, Inc. - Manager Trainee/Collector - Available on August 4, 1999, this job required some climbing and stooping and occasional driving. The job was full time and sedentary. Pay was $6.00 per hour and after Ms. Shilling related Claimant's work background, age, and physical limitations, the potential employer requested a resume'. *Id*.

I do not find that this job constituted suitable alternative employment because it required that Claimant engage in some climbing and stooping, and it Claimant had to make home visits to perform collection work, he may be required to exceed his lifting requirements. Employer made no showing that Claimant would be able to drive an automatic vehicle or not drive in excess of his recommended limitations.

(13) Family Check Advance, L.C.C. - Customer Service - Located in Picayune, Mississippi, the position did not require a GED, offered on the job training, and was mostly sedentary with rare home visits. *Id*. The position was available on October 10, 2000, part-time, twenty to thirty hours a week, and paid $6.50 to $7.00 an hour. *Id*. The position required occasional lifting up to twenty pounds, some carrying of up to twenty pounds, and some twisting, climbing and stooping. Claimant would be required to reach and drive on an occasional basis.

I do not find that this job constitutes suitable alternative employment because it required twisting, climbing, stooping, and lifting that exceeded Claimant's restrictions.

(14) Trinity Marine Products - Based on Dr. Steiner's opinion that Claimant could return to work as a shipfitter, heavy employment, Ms. Shilling identified a position with in Madisonville, Louisiana. Training was provides and the job paid $9.50 to $13.50 per hour depending on experience.

This job does not constitute suitable alternative employment because it exceeds Claimant's light and sedentary work restrictions.

(15) Best Equipment Technologies - Located in Popularville, Mississippi. This job required a minimum of fifty hours per week and paid a salary of up to $11.00 per hour. The job was described as hot, heavy work, and Claimant would have to be tested to see if he could qualify.

This job does not constitute suitable alternative employment because it exceeds Claimant's light and sedentary work restrictions.

(16) Conoco Station & Convenience Store - Cashier - Available on September 10, 2001, in Picayune, Mississippi, this job offered a thirty hour of work a week at the rate of $5.15 per hour. The job required a light-medium level of exertion and provided a padded stool. *Id*. Dr. Steiner, however, refused to approve the position because it required lifting in the range of twenty to fifty pounds. *Id*. at 53-54.

I do not find that this job constitutes suitable alternative employement as it did not even meet with the lesser work restrictions of Dr. Steiner.

(17) Service Zone - Computer Service Representative - Located in Bogalusa, Louisiana, and available on October 9, 2001, this job was sedentary, paid between $7.00 and $8.00 per hour, and required computer proficiency before a candidate could apply.

Claimant has a ninth grade education with a GED and there is no evidence in the records that he has any computer experience. Accordingly, I do not find that this job constitutes suitable alternative employment.

(18) CCP., LLC - Telephone Collections - Located in Picayune, Mississippi and available in May 2002, this was a sedentary position paying $7.00 per hour. The job required occasional reaching, some climbing of the business steps, and lifting was limited to a telephone receiver. A padded chair was provided, Claimant received a one hour lunch break and two fifteen minute breaks and had opportunities to stand and stretch.. The job consisted of selling the businesses commercial debt collection service to other businesses in an effort to gain new customers. (Tr. II, p. 61-62; CX 5, p. 3-4).

I do not find that this job constitutes suitable alternative employment because it requires occasional reaching and requires Claimant to climb.

Therefore, I find that Employer established suitable alternative employment on January 5, 1999 at the rate of $5.15 per hour, thirty-two hours per week, for an average weekly wage in 1997 of $164.80 per week. Under the express terms of Section 8(c)(21), a permanent partial disability is payable based on the difference between an employee's pre and post-injury earning capacity. 33 U.S.C. §908(c)(21) (2002). Under Section 8(h) of the act, a claimant's post-injury wage earning capacity is determined by his actual earnings or the amount set by the adjudicator. 33 U.S.C. §908(h) (2002). "Sections 8(c)(21) and 8(h) of the Act require that wages earned in a post-injury job be adjusted to the wages that the job paid at the time of the claimant's injury and then compared with his average weekly wage to compensate for inflationary effects." *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254, 259 (1998). In this case, Ms. Shilling reported that sole job that she identified constituting suitable alternative employment had always paid minimum

wage. Claimant was injured on February 13, 1992, with an average weekly wage at the time of his injury of $426.72. In 1992 the minimum wage was $4.25 per hour, reflecting an average weekly wage of $136.00 based on a thirty-two hour work week for the job at Seven Acres Substance Abuse Clinic. *See* U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *History of Minimum Wage Rates Under the Fair Labor Standards Act, 1938-1996*, <http://www.dol.gov/esa/minwage/chart.htm> (visited Nov. 8, 2002).

D(3) Diligence

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ). The claimant need not prove that he was turned down for the exact jobs that the employer showed were available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed were available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991).

Here, Claimant testified that he applied for every job lead that Employer's vocational expert sent to him but was without success in obtaining any job. (Tr. I, p. 11). Claimant did not undertake any job search on his own initiative, and the evidence at trial suggested that Claimant was presenting to prospective employers with his medical records. (Tr. II, p. 61-63, 72). This fact indicated to Ms. Shilling that Claimant's job search was only half-hearted. (Tr. II, p. 72). Based on these facts, I find that Claimant has not engaged in a diligent job search such as to negate Employer's showing of suitable alternative employment. *See Emerson v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 239, 244 (1999)(ALJ)(finding diligence when the claimant lived in a remote area, there was little business and industry, claimant's disability prohibited full participation in the already limited and competitive job market, and the claimant was compliant with a rehabilitation placement program and attempted to apply for eleven jobs, some on his own initiative); *Martin v. Marine Terminals Corp.*, 32 BRBS 338, 340 (1998)(ALJ) (finding a diligent job search when the claimant submitted a list of twenty-four prospective employers that he contacted over a four month period with whom he inquired about job opportunities, sent resumes and applications, conducted follow-up inquires to a vast range of potential employers, and credibly testified that he wanted a job to support his family but no employer would not hire him because he had to use a cane).

E. Mileage

Mileage costs for obtaining reasonable and necessary medical treatment are compensable under Section 7(a) of the Act. 33 U.S.C. § 907(a) (2002); 20 C.F.R. § 702.401(a) (2001) (providing that medical care includes the cost of travel incident thereto); *Castagna v. Sears, Roebuck & Co.*,

4 BRBS 559, 561-62 (1976) (stating that transportation costs incurred in connection with medical treatment are compensable even though the Act only speaks in terms of medical services, and include fees for mileage, parking, tolls, and other expenses incidental to traveling to and from medical appointments); *Sousa v. General Dynamics Corp.*, 21 BRBS 316, 324 (1988) (finding that mileage to and from the pharmacy is compensable because it is transportation for a medical service).

Regarding a party's expenses for attending the formal hearing, the general rule is that a party-in-interest is not a witness entitled to costs even though he or she may testify at trial. 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 54.77[5-1] (2d ed. 1989). Under the Act, Section 28(d) provides for the reimbursement of litigation expenses when an attorney's fee may be assessed against the employer. 33 U.S.C. § 928(d) (2002). Specifically, Section 28(d) states that the employer or carrier is liable for "costs, fees and mileage for necessary witnesses attending the hearing at the instance of the claimant." *Id*. The Act does not say the mileage costs of the claimant are taxable to the employer. Section 28(d) of the Act only pertains to the reasonable and necessary costs of witnesses and not to the recovery of costs in general. *See* S. Rep. No. 92-1125, 92d Cong., 2d Sess., p. 23 (1972). Absent some exceptional circumstances, I find no reason to depart from the general rule that a party bears his own expense in attending the formal hearing.

Likewise, I find that Claimant is not entitled to mileage expenses incurred in applying for jobs identified by Employer's vocational expert. An employer has no obligation to find a job for a claimant, and an employer need only show that employment is available, based on a claimant's restrictions, within the claimant's community. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981). The burden is on the claimant to show that there is no job within the community reasonably available to him within the compass of opportunities presented by his employer. *Id*. Accordingly, I allow Claimant reimbursement for mileage expenses incurred for medical treatment, but deny mileage expenses incurred for attending the formal hearing and for applying for jobs presented by Employer's vocational expert.

Claimant submitted mileage records for 4,800 miles and $45.50 in parking expenses. Of that amount I find that 455 miles reflect non-compensable mileage expenses. Claimant did not submit a cost per mile, and under the circumstances I find that 36.5 cents per mile is reasonable and appropriate. *See* 41 C.F.R. § 301-10.303 (providing a schedule of reimbursement for the use of a privately owned vehicle under public contracts). Accordingly, I find that Claimant is entitled to $1,585.93 in mileage expenses (4800 miles - 455 miles = 4,345 miles x .365 cents per mile = $1,585.93), and $45.50 in parking expenses for a total reimbursement for travel expenses of $1,631.43 under Section 7 of the Act.

F. Conclusion

I find the medical evidence shows that Claimant is capable of sedentary to very light work until July 21, 1999, as determined by Judge Mills in his April 30, 1997 Decision and Order. After that

period, I find that Claimant is capable of work only a sedentary basis where he can alternate sitting, standing and walking, and avoid activities all such as twisting, climbing, kneeling, stooping, crawling, reaching, and Claimant should limit his driving to twenty or thirty minutes using an automatic transmission. Claimant cannot return to his former longshore job, and Employer established suitable alternative employment on January 5, 1999, at the rate of $5.15 per hour, thirty-two hours per week, for an average weekly wage in 1997 of $164.80, which corresponds to an average weekly wage of $136.00 at the time Claimant suffered his workplace accident in February 1992. Claimant failed to demonstrate diligence in seeking employment to rebut Employer's showing that jobs are available in him community for which he can realistically and likely secure. Claimant is entitled for mileage reimbursement in obtaining reasonable and necessary treatment from his treating physicians and for obtaining his prescription medication but not for attending the formal hearing and traveling to job sites provided by Employer's vocational expert.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act from February 21, 1992, to June 25, 1997, based on an average weekly wage of $426.72, and a corresponding compensation rate of $284.48.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act from June 26, 1997 to January 5, 1999, based on an average weekly wage of $426.72, and a corresponding compensation rate of $284.48, to be adjusted in accordance with Section 10(f) of the Act.

3. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c)(21) of the Act from January 6, 1999, and continuing, based on a pre-injury wage earning capacity of $426.72, and an adjusted post-injury wage earning capacity of $136.00 per week, for a corresponding compensation rate of $193.81 per week. (426.72 - 136.00 = 290.72 x 2/3 = 193.81).

4. Employer shall reimburse Claimant for $1,631.43 incurred for travel expenses associated with reasonable and necessary treatment under Section 7 of the Act.

5. Employer shall be entitled to a credit for all compensation paid under the Act.

6. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge